No. SC95678

IN THE MISSOURI SUPREME COURT

Joshua Peters,

Respondent,

v.

Rachel M. Johns,

Appellant.

Appeal from the St. Louis City Circuit Court Twenty-Second Judicial Circuit

Brief of American Civil Liberties Union of Missouri Foundation in Support of Appellant as *Amicus Curiae*

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Authority to File

Amicus file this brief with the consent of the parties and the Attorney General of Missouri and pursuant to Mo. R. Civ. P. 84.05 (f)(2).

Jurisdictional Statement

Amicus adopts the jurisdictional statement as set forth in Appellant's brief filed with the Court in this case.

Statement of Facts

Amicus adopts the statement of facts as set forth in Appellant's brief filed with the Court in this case.

Interests of Amicus Curiae

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Missouri is the ACLU's affiliate in the State of Missouri, which has more than 4,500 members.

The ACLU of Missouri has often participated as amicus curiae or as direct counsel in cases involving voting rights in Missouri. For example, Missouri State Conference of the NAACP, et al. v. Ferguson-Florissant School District, et al., No. 4:14-cv-02077-RWS (E.D. Mo.), brought under Section 2 of the Voting Rights Act and in which a decision has not yet been issued, challenges the School District's at-large method for electing school board members and alleges that it deprives African-American residents of an equal opportunity to elect representatives of their choice; Day v. Robinwood West Community *Improvement District*, 693 F. Supp. 2d 996 (E.D. Mo. 2010), challenged the statutory voting procedures for community improvement districts; Prye v. Carnahan, No. 04-4248-CV-C-ODS (W.D. Mo. July 7, 2006), challenged the exclusion of persons under guardianship from the voting rolls; Seay v. Jones, 439 S.W.3d 881 (Mo. App. W.D. 2014), challenged the summary statement of a legislatively proposed constitutional amendment that would have limited the legislature's authority to permit early voting; Vowell v. Kander, 451 S.W.3d 267 (Mo. App. W.D. 2014), challenged the Secretary of State's purported authority to evaluate a candidate's qualifications and then, based on that evaluation, exclude that candidate's name from a list of names certified to appear on a primary election ballot; *Jackson County, Missouri v. State*, No. 06AC-CC00587 (Cir. Ct. Cole Co.), challenged a statute limiting the types of identification that could be accepted by local election officials; *Aziz v. Mayer*, 11AC-CC00439 (Cir. Ct. Cole Co.), challenged the summary statement of a legislatively referred proposed constitutional amendment that would have authorized the legislature to impose significant burdens on the right to vote; Moreover, ACLU affiliates across the county have challenged voter-registration requirements that serve as a prerequisite for participation in the political process, particularly those state laws that limit who may circulate a petition.

Argument

The phrase "qualified voter" in Article III, section 4 of the Missouri

Constitution should be construed as meaning any individual who possesses
the constitutional qualifications to vote, it should not be construed as a
substitute definition for an individual who is a "registered voter."

"This Court will avoid deciding a constitutional question if the case can be resolved fully without reaching it." *Lang v. Goldsworthy*, 470 S.W.3d 748, 751 (Mo. banc 2015). While Johns is correct in asserting that her rights under the First and Fourteenth Amendments of the United States Constitution have been violated by the State's conclusion that she is not eligible to be elected as a state representative, those federal constitutional issues need not be reached because the case can be resolved by this Court's interpretation of Article III, section 4, of the Missouri Constitution.¹

This Court should construe the phrase "qualified voter" in Article III, section 4, of the Missouri Constitution as meaning one who possesses the qualifications to vote, not as a substitute for the phrase "registered voter." "The constitution defines the qualifications

All constitutional references are to the Missouri Constitution. All statutory references are to Missouri Revised Statutes (2000), as updated.

of voters, making no reference to registration as one of them." *State ex rel. Harrison v. Frazier*, 11 S.W. 973, 973 (Mo. 1889).²

The Missouri Constitution requires that a state representative "be twenty-four years of age, and next before the day of his election shall have been a qualified voter for two years and a resident of the county or district which he is chosen to represent for one year, if such county or district shall have been so long established, and if not, then of the county or district from which the same shall have been taken." Mo. Const., art. III, § 4. The core of the Respondent Peters's position in this case is that Appellant Johns's has not been a "qualified voter" for the requisite period of time because, during a portion of that time, she was not registered to vote. The existence of any dispute regarding Appellant Johns's qualifications as a candidate for election is premised on the notion that the term "qualified voter" in this constitutional provision means a person who is not only qualified to vote but also registered to vote.

All citizens over the age of eighteen who reside in Missouri are qualified to vote, "[p]rovided ... no person who has a guardian of his or her estate or person by reason of mental incapacity, appointed by a court of competent jurisdiction and no person who is involuntarily confined in a mental institution pursuant to an adjudication of a court of competent jurisdiction shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from voting." Mo. Const., art. VIII, § 2.

This Court has never directly addressed whether the phrase "qualified voter" as it appears in Article III, section 4, of the Missouri Constitution requires that an individual be not only eligible to vote but also registered to vote. Both the Western and Eastern Districts of the Missouri Court of Appeals have so construed the phrase. *See State ex rel. Burke v. Campbell*, 542 S.W.2d 355, 358 (Mo. App. E.D. 1976); *see also State ex rel. Mason v. Cnty. Legislature*, 75 S.W.3d 884, 887 (Mo. App. W.D. 2002) (relying on *Burke* for proposition that "the term 'qualified voter' ... is synonymous with 'registered voter.'"); *Steinmetz v. Smith*, 613 S.W.2d 157, 158 (Mo. App. E.D. 1981). These cases were erroneously decided and should be overruled.³

In interpreting Article III, section 4, of the Missouri Constitution, this Court has explained that, "[w]ords used in constitutional provisions are interpreted to give effect to

The lower appellate courts relied on decisions of this Court that arose in the context of petitions. *See Scott v. Kirkpatrick*, 513 S.W.2d 442, 444 (Mo. banc 1974) (interpreting the phrase "qualified voter" appearing in Section 126.151 as making registration a prerequisite for signers of initiative petitions); *State ex rel. Woodson v. Brassfield*, 67 Mo. 331, 337 (1878) (holding that one not registered, though otherwise qualified, would not be considered a "qualified voter"). Each of those cases involved statutory construction, not construction of a constitutional provision, and neither case would limit voters' choices of who will represent them. This Court need not revisit those cases to determine the meaning of "qualified voter" in Article III, section 4; however, for the reasons explained here, they were likely incorrect.

their plain, ordinary, and natural meaning." *Gray v. Taylor*, 368 S.W.3d 154, 156 (Mo. banc 2012) (citing *Buechner v. Bond*, 650 S.W.2d 611, 613 (Mo. banc 1983)). Had the drafters of the Missouri Constitution intended to limit eligibility to run for state representative to individuals who had been registered to vote for a full two years prior to the election, they could have crafted language to that effect. Indeed, the phrase "registered voter" appears elsewhere in the constitution. *See* Mo. Const., art. VI, § 30(a) (requiring petition proposing exercise of powers to be "signed by registered voters"); Mo. Const. art. XIII, § 3 (requiring members of Citizens' Commission on Compensation for Elected Officials to be "registered voters"). ⁴ The phrase "registered voter" would have appeared in Article III, section 4, as well, were it the drafters' intent to require voter registration.

As the Constitution was drafted, however, the phrase "qualified voter" in Article III, section 4, is clearly and unambiguously not the same as "registered voter." Where

The legislature also understands that "qualified voters" and "registered voters" are not synonymous. The Community Improvement District Act, for instance, defines "qualified voters" for purposes of director elections to include not only "registered voters" but also "owners of real property[.]" § 67.1401. Specifically, a person who is not registered to vote is nonetheless a qualified voter if he or she owns non-exempt property in a Missouri Community Improvement District. *Id.* That registration to vote is not synonymous with being qualified to vote is also demonstrated by the fact that the qualifications of a registered voter may be investigated. § 115.191.

"[t]he language of this clause is susceptible to a clear and unambiguous interpretation based only on the plain and ordinary meaning of the words[, a] court may not add words by implication when the plain language is clear and unambiguous." *Wright-Jones v. Nasheed*, 368 S.W.3d 157, 159 (Mo. banc 2012) (citing *State ex rel. Young v. Wood*, 254 S.W.3d 871, 873 (Mo. banc 2008)). "Qualified voter" in Article III, section 4, means what the framers said qualifies one—i.e., makes one *eligible*—to vote: being a citizen, over the age of eighteen, legally competent, not involuntarily confined to a mental institution, and not excluded from voting because of conviction of a felony or crime related to the right of suffrage. Mo. Const. art. VIII, § 2.

The Eastern District went astray in *Burke* by substituting its own policy judgment for the clear and unambiguous language of Article III, section 4. The *Burke* court speculated that the framers could not have intended that a candidate not registered to vote in his or her own election might serve as a state representative. *Burke*, 542 S.W.2d at 358. Absent from *Burke*, however, is any explanation from the court as to why the framers could not have simply intended to permit voters to make a choice to elect a person who was eligible to vote, but not registered to vote, in his or her own election. ⁵ Contrary to

The fact that Appellant Johns was not registered to vote until February 4, 2015, does not change that she was qualified to vote long before she registered. Nor should her decision not to register to vote disqualify her from running for office. One of Missouri's favorite sons, General of the Army Omar N. Bradley, refused to "vote in elections, considering this decision part of [his] duty" under his conception of military

Burke's speculation, there is nothing in the language of Article III, section 4, or in any contemporaneous authority, to suggest that the framers sought to limit the choices of voters in this manner. Voters are capable of deciding for themselves whether to vote for someone who, while constitutionally eligible to vote, has not registered to vote.⁶ But

professionalism. Eric A. Hollister, *The Professional Military Ethic and Political Dissent: Has the Line Moved?*, The Association of the United States Army's Institute of

Landwarfare National Security Affairs Paper No. 83, August 2011, at 2. Had Bradley

returned home to Randolph County after retiring from the Army in 1953 and decided to

run for state representative—perhaps answering a calling like his friend and colleague

Dwight Eisenhower—he would not have been able to do so if "qualified voter" as it

appears in Article III, section 4, were construed to require registration. This is not a result
the drafters intended. Certainly, Bradley's neighbors might have chosen to be represented
by him despite his principled decision not to register to vote.

The logic of *Burke* is faulty in other respects as well. If "qualified voter" means that an individual must be registered to vote in the election for the office he or she seeks, then a requirement of being a "qualified voter" in the context of Article III, section 4, would mean that a person running for election must be registered to vote in the district he or she seeks to represent for two years prior to the election; however, the provision itself has only a one-year residency requirement. The constitutional requisite "interest" in the district's affairs is established by the residency requirement, not the qualification to vote.

Burke should not have attempted to divine the framers intent in the first place because the provision is clear and unambiguous. *Burke* made a policy choice, which is the provenance of framers and the people, not the courts.

Other states have refused to interpret the phrase "qualified voter" in their own laws as including only those individuals who are registered to vote. The Iowa Supreme Court noted "that one may be a qualified voter although not registered, and that one may not vote unless registered even though a qualified voter." *Piuser v. Sioux City*, 262 N.W. 551, 554 (Iowa 1935). "We think it is generally recognized that, as said in 20 C. J. 81, 'registration is a regulation of the exercise of the right of suffrage and not a qualification for such right." *Id.* (citations omitted). The Supreme Court of Pennsylvania explained:

We cannot agree with the contention which was earnestly advocated before us, and which was also the opinion of the court below, that registration is an essential qualification of an elector. . . . Registration may be and usually is prerequisite to voting; but it is not a qualification for the exercise of the franchise. No attorney is permitted to argue before the bar of this court without being formally admitted; yet no one would contend that the mere motion for admission constitutes a qualification for practice. The same reasoning applies to registration for voting.

Petition of Sullivan, 160 A. 853, 854 (Penn. 1932). The Minnesota Supreme Court, quoting Sullivan, agreed with this reasoning and stated further that, "[m]any other cases

could be cited in support of the same view." *Eastwood v. Donovan*, 105 N.W.2d 686, 688 (Minn. 1960). Those cases include one from the Supreme Court of Tennessee and the Supreme Court of Washington. *See Trammell v. Griffin*, 207 S.W. 726, 727 (Tenn. 1918) (holding "the word 'voter' is used to describe a person entitled to register, and not a person actually registered" and noting that, "[i]ndeed, . . . persons are referred to as 'qualified voters' before registration"); *Hindman v. Boyd*, 84 P. 609, 613 (Wash. 1906) (holding that, "registration is not an element entering into the definition of a qualified voter[; moreover,] registration laws cannot be justly regarded as adding a new qualification to those prescribed by the Constitution, but that they are merely reasonable and convenient regulations prescribing the mode of exercising the right to vote").

This Court should construe the phrase "qualified voter" in Article III, section 4, as meaning one who possesses the qualifications to vote, and is therefore eligible to vote, not as a substitute for the phrase "registered voter." "Statutes that regulate access to the ballot are to be construed, if possible, to prevent disqualification of candidates." *State ex rel. Brown v. Shaw*, 129 S.W.3d 372, 374 (Mo. banc 2004) (citing *State ex inf. Mitchell v. Heath*, 132 S.W.2d 1001, 1004 (Mo. 1939)). Construing qualified voter to mean someone qualified to be a voter rather than adding the requirement that they also be registered is what the framers intended. Moreover, if there is any question about the intent of the framers, then this Court should interpret the provision in a way to expand—rather than restrict—the choices of voters. Finally, although this Court need not reach the issues raised under the First and Fourteenth Amendments to the United States Constitution, it is important to recognize that this Court has repeatedly held that, any laws are "to be

construed so as to render [them] constitutional, if this is possible." *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 687 S.W.2d 162, 165 (Mo. banc 1985). This rule of interpretation furthers a core principle of judicial restraint: "A court will avoid the decision of a constitutional question if the case can be fully determined without reaching it." *Id.* As noted, the issue in this case can be resolved without reaching the federal constitutional claims.

For these reasons, this Court should hold that Appellant Johns has been a "qualified voter," as that phrase is used in Article III, section 4, for the requisite period and, thus, she should be allowed to run for the office of State Representative for State House District 76.

Conclusion

Based on the foregoing, Amicus Curiae urge this Court to reverse and vacate the judgment of the circuit court and remand for further proceedings consistent with the discussion above, and with instructions that Appellant Johns be certified to appear on the ballot as a candidate to represent State House District 76.

Respectfully submitted,

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Certificate of Service and Compliance

The undersigned hereby certifies that on May 9, 2016, the foregoing amicus brief was filed electronically and served automatically on the counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 2,795 words (excluding the cover, signature block, and this certificate of service and compliance), as determined using the word-count feature of Microsoft Office Word 2007. Finally, the undersigned certifies that electronically filed brief was scanned and found to be virus-free.

/s/ Anthony E. Rothert